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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE QUESTIONS PRESENTED

I. May Federal Black Lung benefits be awarded on the theory that the employer failed to prove that the claimant was not disabled "in part" by pneumoconiosis, where the controlling statute provides for benefits only for "total disability due to pneumoconiosis"?

II. May Federal Black Lung benefits be awarded on the theory that the employer failed to prove that the claimant was not disabled in part by pneumoconiosis, in the face of uncontradicted evidence that the claimant was totally disabled as a result of illnesses wholly unrelated to pneumoconiosis?

PARTIES TO THE PROCEEDINGS

This case involves issues important to the adjudication of claims filed under the Federal Black Lung Acts. The Petitioner is the Saginaw Mining Company, P. O. Box 275, St. Clairsville, Ohio. It is a wholly owned subsidiary of the Oglebay Norton Company, 1100 Superior Avenue, Cleveland, Ohio. The Claimant-Respondent is Lewis Gibas, Route 1, St. Clairsville, Ohio, a former employee of Saginaw. The U.S. Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, 200 Constitution Avenue, N.W. Washington, D.C., 20210 is a Respondent also. 20 C.F.R. § 802.411(b). The Benefits Review Board, U.S. Department of Labor, 1111 20th Street, N.W., Suite 757, Vanguard Building, Washington, D.C. 20036, is a Respondent in name only. Rule 15(a), F.R. App. P.

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No. 84-

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Saginaw Mining Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 26, 1984.

OPINIONS BELOW

Under the federal statutes and regulations, "Black Lung" claims are first heard by an Administrative Law Judge (ALJ) of the Department of Labor. An "on the record" appeal lies to the Benefits Review Board (the

Board), and then to the United States Court of Appeals. 33 U.S.C. §§ 921(b) and (c).

The opinion of the ALJ in this case is not reported. A copy is in the Appendix hereto (hereinafter referred to as "App. ——") at 31a-37a. The Board's opinion is reported at 6 Black Lung Reporter (BLR) 1-18 (1983). A copy of it is at App. 19a-30a. The Court of Appeals decision is reported at 748 F.2d 1112 (Nov. 26, 1984). A copy of the decision appears at App. 1a-16a. The judgment is at App. 17a-18a.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals was entered on November 26, 1984. This Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(c) and 33 U.S.C. § 921(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. The Federal Coal Mine Health & Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, §§ 401 and 402, 30 U.S.C. §§ 901, 902. App. 38a-41a.

2. Federal Mine Safety & Health Act of 1977 (Black Lung Benefits Act) §§ 402 and 411(c)(5), 30 U.S.C. §§ 902, 921(c)(5). App. 42a to 44a.

3. 20 C.F.R. §§ 410.412, 410.426, 727.203. (App. 45a-51a)

STATEMENT OF THE CASE

Lewis Gibas is a former employee of petitioner Saginaw Mining Company. He worked for Petitioner until he suffered a heart attack in 1975. After his heart attack in

1975, all the activity he had been accustomed to doing was stopped. After his heart attack, he was off work for a year, tried to start working again and then was hospitalized for his heart problems. He was hospitalized for his heart conditions 12 times between 1975 and 1978. No mention was ever made of pneumoconiosis in these hospitalizations.

Mr. Gibas then filed an application for benefits under the Federal Coal Mine Health & Safety Act of 1969, 30 U.S.C. § 901, *et seq.*, as amended. Mr. Gibas stated in his application for benefits that he quit work because of his heart attack which had disabled him. Mr. Gibas later admitted that he obtained Social Security Disability Benefits for his heart problems. Mr. Gibas also received sickness and accident benefits due to his heart attack. He also had an arthritic condition in his knee.

A hearing was held on October 28, 1980, by the ALJ. The only medical evidence in this case was as follows. There was one positive x-ray showing the most minimal stage of pneumoconiosis recognized by the regulations. 20 C.F.R. § 410.428. Four other x-ray opinions were negative for pneumoconiosis. The remainder of the evidence was uncontroverted. It is conceded, and the ALJ found, that there was "no medical opinion evidence" showing that Mr. Gibas was totally disabled due to pneumoconiosis. (App. 34a) There was undisputed evidence of the existence of congestive heart failure, high blood pressure and arthritis. The Claimant's own doctor reported the existence of coronary artery disease with an inferior myocardial infarction and three vessel disease found at the Cleveland Clinic, for which no surgery is possible.

A pulmonary specialist testified to a reasonable degree of medical certainty that Mr. Gibas was not totally disabled due to pneumoconiosis or any respiratory or pulmonary impairment. He testified to a reasonable degree of medical certainty that any total disability this man might

have did not arise in whole or in part out of his coal mine employment. He testified that on the basis of the man's respiratory condition, the man would be able to do his usual work or comparable and gainful work. This is corroborated by the medical report of the Department of Labor's doctor, who stated that the claimant would be capable of doing his normal work in the mines.

Nevertheless, the ALJ found the Claimant entitled to benefits in an opinion and order issued on or about February 6, 1981. To reach this conclusion he invoked a presumption of total disability set forth in 20 C.F.R. § 727.203(a)(1).

Upon the appeal to the Benefits Review Board, the Board reversed. The Board held that the presumption relied upon by the ALJ was inconsistent with the statute. Following its prior decision in *Jones* v. *The New River Co.*, 3 Black Lung Reporter 1-199 (1981), the Board held that the language of the regulation relied upon below would allow the granting of claims where only part of the disability was due to pneumoconiosis; and that such was contrary to the statutory requirement that benefits only be granted in a case of total disability resulting from pneumoconiosis.

The Court of Appeals reversed, holding that while the Board had the authority to find the regulatory presumption contrary to the statute, it erred in finding that the "in whole or in part" language of 20 C.F.R. § 727.203 (b)(3) was in fact inconsistent with the statute. The Court further held that the operator had the burden of disproving that the claimant was totally disabled due to pneumoconiosis and had not carried that burden.

A. The Statute

Section 401 of Title IV of the Federal Coal Mine Health & Safety Act of 1969 states that the Act's purpose was to provide benefits to living miners who are ". . . totally

disabled due to pneumoconiosis" and to the survivors of miners ". . . whose deaths were due to . . . [pneumoconiosis] or who were totally disabled . . . [by it] at the time of their deaths." 30 U.S.C. § 901. The Secretary of H.E.W. was granted authority to define "total disability" in accordance with the Act, and that such regulations were to provide that a miner shall be considered totally disabled when his pneumoconiosis prevents him from engaging in gainful employment comparable to his mine employment. 30 U.S.C. § 902(f). No authority was given in the Act to provide benefits to miners only "partially" disabled by pneumoconiosis.

Similar "total disability" requirements were set forth in the 1977 amendments to § 402(f). The Secretary of Labor's regulations were to continue to require that a miner be considered totally disabled when his pneumoconiosis prevents him or her from engaging in gainful employment requiring skills and abilities comparable to the miner's mine employment. 30 U.S.C. § 902(f)(1)(A). Although the 1977 Act relaxed the medical standards, 30 U.S.C. § 902(f), no authority was given to promulgate regulations, as to live miners, which would allow benefits for only partial disability due to pneumoconiosis.

B. The Regulations

The Secretary of H.E.W. promulgated 20 C.F.R. § 410.412 early in the program. True to the statute, it tracked the statutory requirement of total disability. The Department of Labor, however, in August of 1978 at 43 Fed. Reg. 36825 promulgated 20 C.F.R. § 727.203 which creates an interim presumption of total disability. Once a claimant establishes a presumptive case, in one of the four ways set forth in § 727.203(a), the operator may rebut the presumption of total disability under the language of 20 C.F.R. § 727.203(b)(3) *only* if it can show that the total disability did not arise in whole *or in part* out of coal mine employment.

C. The ALJ's and the Board's Decisions

As shown previously, the ALJ invoked the presumption of total disability set forth in 20 C.F.R. § 727.203(a)(1) on the basis of one x-ray showing the most minimal accepted category of pneumoconiosis. The ALJ acknowledged that:

> ". . . there is no medical opinion evidence to the effect that the claimant is totally disabled due to pneumoconiosis." (App. 34a)

The ALJ also said:

> "It is recognized that the claimant has serious cardiovascular problems, that these problems led to his retirement in June, 1978 and contribute to his present shortness of breath and that apparently his pneumoconiosis by itself, did not prevent him from working in June, 1978 or earlier." (App. 35a-36a)

The ALJ then rejected the uncontradicted medical evidence showing that the man's disability was due to his heart problems, and not from his pneumoconiosis as being "unduly speculative." (App. 36a) He refused to find the presumption rebutted.

The Board reversed the ALJ and directed that the claim be denied. The Board found that the ALJ incorrectly interpreted § 727.203(b)(3) as to the "in part" language in view of its earlier cases. The Board stated that, "Thus, a showing that the miner's disability is totally due to heart disease has been held sufficient to support subsection (b)(3) rebuttal." App. 23a. The Board also found that the ALJ erred in rejecting the medical testimony that the claimant's disability was due to heart disease as being "unduly speculative." The Board found that the documentation supported such conclusion and that the ". . . record reveals there is no medical opinion contradicting Dr. Kress' conclusion", which so stated. The Board thereby found the presumption to be rebutted as a matter of law. (App. 23a)

D. The Court of Appeals' Decision

The Court of Appeals devoted the majority of its decision in deciding whether the Board possessed sufficient adjudicatory authority to declare the regulation invalid as being inconsistent with the Act. After it ruled that the Board had such authority,[1] it went on to uphold the Secretary's presumption in the face of the Board's decision. It then went on to hold, in light of the presumption, that Saginaw failed in its ". . . burden of proving that Gibas was not totally disabled." (App. 16a)

REASONS FOR GRANTING THE WRIT

I. THE BENEFITS REVIEW BOARD CORRECTLY HELD THAT 20 C.F.R. § 727.203(b)(3), IN ALLOWING RECOVERY OF BENEFITS FOR PARTIAL DISABILITY DUE TO PNEUMOCONIOSIS, IS CONTRARY TO THE CONTROLLING STATUTE. THIS IS A MOST IMPORTANT QUESTION OF FEDERAL BLACK LUNG LAW.

The Black Lung Acts require the payment of benefits to miners who are totally disabled because of pneumoconiosis where that pneumoconiosis arose from his employment in the mines. 30 U.S.C. §§ 901 and 902. Under the Secretary of Labor's regulations, after the employee produces certain evidence of pneumoconiosis, he is presumed to be totally disabled and the burden then shifts to the employer to establish that "the total disability did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3).

As construed by the Court below, this presumption can only be overcome if the employer is able to prove that pneumoconiosis played no part in causing a miner's disability. In requiring the employer to prove that no part

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[1] The Court correctly relied upon such cases as *Crowell* v. *Benson*, 285 U.S. 22, 76 L. Ed. 598 (1932) in coming to this conclusion, it is respectfully submitted.

of a miner's claimed condition is attributable to pneumoconiosis, the Court's opinion and the regulation would allow recovery of benefits even though, as here, the uncontroverted evidence demonstrates that the claimant was in fact totally disabled as a result of other ailments—from arthritis to recurrent congestive heart failure, hypertension, and coronary artery insufficiency—having nothing to do with pneumoconiosis or employment in the mines. As applied by the Court of Appeals, the regulatory presumption conflicts with the statutory requirement that a claimant may only recover if he is "totally disabled due to pneumoconiosis." [2]

"Black lung" claims are adjudicated under procedures established in Title IV of the Federal Coal Mine Health and Safety Act of 1969 and the amendments thereto. 30 U.S.C. § 901 *et seq.* The Act was and is designed to provide benefits for miners who were "totally disabled due to pneumoconiosis." 30 U.S.C. § 901. The original legislation gave authority to the Secretary of HEW to promulgate regulations. 30 U.S.C. §§ 902(f) and 932(h) (1976). The early regulations required the miner to be totally disabled to be entitled to benefits. 20 C.F.R. § 410.412.

In 1977, the current § 402(f) of the Act, 30 U.S.C. § 902(f), was adopted. It gave the Secretary of Labor the authority to define "total disability" and to promulgate regulations for processing claims under Part C. As with the earlier version of the law, nowhere in § 902(f) is there authority to provide benefits to miners "partially" disabled by pneumoconiosis. Indeed, the Depart-

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[2] This Court has not been reluctant to examine regulatory presumptions when important questions are present, as here, such as whether the regulation is contrary to the enabling statutes. *See, U.S. Industries/Federal Sheet Metal, Inc., et al.* v. *Office of Workers Compensation Programs, United States Department of Labor, et al.*, 455 U.S. 608, 71 L. 2d 2d 495 (1982).

ment of labor was only authorized to establish criteria for appropriate medical tests which "accurately reflect *total disability.*" *Id.* § 902(f)(1)(D). (Emphasis added)

Numerous presumptions are available to a claimant, in both the statutes and the regulations, to assist him in establishing his claim. The so called "Interim Presumptions" in the regulations promulgated on August 18, 1978 set forth various minimal standards to trigger a presumption of total disability due to pneumoconiosis. These appear in 20 C.F.R. Part 727. Section 727.203(a) creates some of these presumptions. A claimant can invoke a rebuttable presumption of total disability due to pneumoconiosis by a positive x-ray [§ .203(a)(1)]; by ventilatory tests [§ .203(a)(2)] or arterial blood gas tests [§ .203(a)(3)], meeting certain values; or by a medical report stating the presence of total disability due to pneumoconiosis [§ .203,(a)(4)]. Since thousands of cases remain to be resolved under the interim presumptions in § 727.203, the important questions presented herein are not at all moot but are of continued concern and need to be finally resolved by this Court.

Under 20 C.F.R. § 727.203(b), the operator may rebut the presumption after it has been invoked in a very limited number of ways. It may do so by showing the miner is in fact doing his usual coal mine work or comparable work [§ .203(b)(1)]; by evidence that he is able to do his usual coal mine work or comparable work [§ .203 (b)(2)]; by evidence that the total disability did not arise in whole or in part out of coal mine employment [§ .203(b)(3)]; or that the miner does not have pneumoconiosis [§ .203(b)(4)]. Rebuttal under (b)(1), where the man is still working, is very rare indeed. It is difficult to show rebuttal under (b)(4) when, as here, there is an x-ray showing pneumoconiosis present. The operator as a practical matter is left with arguing (b)(2) and (b)(3) in the vast majority of cases. In this case, the Board did not even address operator's (b)(2) argument,

and so the operator here was limited entirely to consideration of its (b)(3) rebuttal argument.

The effect of the regulation relied upon by the ALJ in this case, 20 C.F.R. § 727.203(b)(3), is to expand the scope of the enabling Act. In promulgating § 727.203 (b)(3), the Secretary of Labor was acting outside his authority which is derived from, and governed by, the terms of the statute. *See, e.g., Peters* v. *Hobby*, 349 U.S. 331, 99 L. Ed. 1129 (1955). In *Stark* v. *Wickard*, 321 U.S. 288, 88 L. Ed. 733 (1944), Justice Reed in the majority opinion stated, "[w]hen Congress passes an Act empowering the administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." 321 U.S. at 309, 88 L. Ed. at 748 (1944).

Under the "in part" language of 20 C.F.R. § 727.203 (b)(3), a miner would be entitled to benefits if his pneumoconiosis contributed even a mere 1% to his total disability. This is clearly not in keeping with the expressed intent of Congress in passing legislation to provide benefits to miners "totally disabled because of pneumoconiosis." [3]

Pneumoconiosis, by definition, is "a chronic dust disease of the lung . . . arising out of coal mine employment." 30 U.S.C. § 902(b). Under the Act, a miner will receive benefits when his pneumoconiosis arising out of

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[3] A search of the 1977 legislative history fails to reveal any further Congressional direction in this regard. To the contrary, the floor statements by Senator Javits, a supporter of the Act, were as follows:

> I wish to assure my colleagues that although the bill incorporates a number of liberalized standards governing the adjudication of black lung claims, it clearly preserves its basic integrity as a workers' compensation program by requiring a finding not only of the presence of black lung disease, *but also that the claimant's disability due to the disease prevents him from performing coal mine work.* [Cong. Rec. S14416 (daily ed., February 7, 1978)] [Emphasis supplied].

coal mine employment is "totally disabling." *Id.* Section 727.203(b)(3) as written, however, permits compensation if only *part* of the disability arose out of coal mine employment, *i.e.*, only *part* of the disability need be due to pneumoconiosis. This would permit awards of benefits to claimants *not* totally disabled by pneumoconiosis in and of itself. Besides being inconsistent with the Act, this regulation places upon the employer an almost impossible standard of rebuttal in most cases, where pneumoconiosis (however minimal) is diagnosed. Under § 727.203(b)(3), as written, the employer must show that *no part* of the total disability arose out of coal mine employment.

The Secretary's regulation, ". . . will be sustained [as valid] as long as it is 'reasonably related to the purpose of the enabling legislation' . . . ". *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369, 36 L. Ed. 2d 318, 330 (1973), quoting *Thorpe* v. *Housing Authority of Durnham*, 393 U.S. 268, 280-81, 21 L. Ed. 2d 474 (1969). A regulation must be consistent with the statute under which it is promulgated and if the regulations are unreasonable or contrary to the provisions of the enabling statute, they are invalid. See *U.S. Pipe & Foundry Co.* v. *Webb*, 595 F. 2d 264 (5th Cir., 1979); *United States* v. *Larionoff*, 431 U.S. 864, 53 L. Ed. 2d 48 (1977); *Marshall* v. *Gibson's Products, Inc.*, 584 F. 2d 668 (5th Cir. 1978); *U.S. ex rel. Mississippi Road Supply Co.* v. *H.R. Morgan, Inc.*, 542 F. 2d 262 (5th Cir. 1976), *cert. denied*, 434 U.S. 828, 54 L. Ed. 2d 86 (1977); see also *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 36 L. Ed. 2d 318 (1973). If the ALJ can reject uncontradicted medical opinions without reason as being "unduly speculative" the § 727.203(a) presumptions, in fact, become irrebuttable. Since Congress has clearly chosen not to make the interim presumption irrebuttable, as demonstrated by the existence of 30 U.S.C. § 921(c) and by the legislative history of the Reform

Act, the Secretary has to promulgate regulations which reasonably allow rebuttal as intended by Congress. The "in part" language of 20 C.F.R. § 727.203(b)(3) should not be sustained as valid.

The Board has agreed with this reasoning in the *Jones/Gibas* line of decisions where it stated that the statute only allows claims to be granted where the miner is totally disabled due to pneumoconiosis and that the language of the regulation permits claims to be granted where the miner has only partial disability due to pneumoconiosis. The *Jones* opinion sets forth the Board's rationale in detail:

> "Section 727.203(b)(3) as written, however, permits the presumption to stand if only *part* of the disability arose out of coal mine employment, *i.e.*, only *part* of the disability need be due to pneumoconiosis. This would permit awards of benefits to claimants not *totally* disabled by pneumoconiosis in and of itself. Besides being inconsistent with the Act, this regulations's phraseology places upon employer a nearly impossible burden of proof in cases, such as the instant one, where pneumoconiosis is diagnosed. Under Section 727.203(b)(3), as written, the employer must show that *no part* of the total disability arose out of coal mine employment." (Emphasis in original) (App. 74a)

The Court of Appeals tries to save the regulation by saying that the "in part" language refers to causation, not total disability. It is impossible to see how this tautology saves the regulation. If only part of the disability arises from pneumoconiosis (even if all causes considered together, the claimant is totally disabled), clearly the pneumoconiosis is only a partially causative factor. Either way, coal mine exposure has only caused a part of the inability to work.

Accordingly, if a claimant could invoke the interim presumption on any basis, the only means of rebuttal

under 20 C.F.R. § 727.203(b)(3) would be to show that tne miner was not totally disabled due to a respiratory or pulmonary impairment or that the impairment did not arise to *any* degree, however insignificant, out of coal mine employment. There are many respiratory and pulmonary diseases which have nothing to do with coal dust and stir no controversy on the point. Some may be caused by genetic deficiencies, or bacteria, or cigarette abuse, or metastatic cancer not primary in the lung, or trauma, or obesity, or allergies, or asthma, or some other non-employment related source. The result of the regulation, therefore, is the compensation of all disabling lung disease in coal miners regardless of etiology. This approach was never intended by the Congress and is not reflected in the Act. There is nothing in the Act or its Amendments which detracts from the underlying principle that only totally disabling pneumoconiosis is compensable in the case of a living miner.

The only reference to partial disability in the scheme of the Act is in 30 U.S.C. § 921(c)(5) of the 1977 Amendments. (App. 44a) It concerned certain deceased miners, dying on or before March 1, 1978, who were employed for 25 years in the mines before June 30, 1971. This very limited provision was, in effect, removed by the 1981 Amendments, which indicated that the provision should not apply with respect to claims filed on or after 180 days after the effective date of the Black Lung Benefits Amendments of 1981. Since Congress confined partial disability awards to this specific category of death claims, it is clear that this is as far as it extended "partial disability" awards. Thus, the "in part" language of 20 C.F.R. § 727.203(b)(3) does not comply with the Black Lung Act and is invalid.

Although the Third and Fourth Circuits have similarly interpreted (b)(3), *Carozza* v. *U.S. Steel Corp.*, 727 F. 2d 74 (3rd Cir. 1984), and *Bethlehem Mines Corp.* v. *Massey*, 736 F. 2d 120, 123 (4th Cir. 1984), and there is similar *dicta* in *Alabama By-Products* v. *Killingsworth*,

733 F. 2d 1511, 1516 N. 10 (11th Cir. 1984), to allow the Court of Appeals decision to stand would be to in effect sanction partial disability awards in federal black lung claims. This is so in spite of the fact that the statutes only provide for the awarding of benefits to a living miner who is *totally disabled* due to pneumoconiosis. 30 U.S.C. §§ 901 and 902. There is no question that the Court of Appeals so ruled since at page 4 of its decision, App. 4, it specifically cites the ALJ's finding that:

> "I conclude that the evidence fails to show that the claimant's present disability . . . does not arise at least in part from his pneumoconiosis."

To allow the Court of Appeals decision to stand would be to place an impossible burden upon the coal mine operators to rebut a presumption of total disability once it is invoked. In many, if not all, cases it would be impossible to prove that the miner's total disability did not arise in some small part out of his coal mine employment. To place such burden on the operators would be to run contrary to the expressed intent of Congress in enacting the statutes applicable herein. It is submitted that in this respect the Board's decision that the "in part" language in the regulation was contrary to the statute is correct.

II. THE BOARD FOLLOWED ITS STATUTORY SCOPE OF REVIEW HEREIN AND RULED THAT THE UNDISPUTED EVIDENCE PROVED REBUTTAL OF THE PRESUMPTION OF TOTAL DISABILITY. THERE WAS NO SUBSTANTIAL EVIDENCE OF RECORD TO SUPPORT THE AWARD OF BLACK LUNG BENEFITS TO CLAIMANT LEWIS GIBAS. THESE QUESTIONS INVOLVE THE COURT'S LIMITED SCOPE OF REVIEW.

The Board examined all of the evidence in the record. Far from overstepping its statutory scope of review, it meticulously examined all of the evidence in the record to

see if the ALJ's decision was supported by substantial evidence. It acknowledged its limited scope of review. (App. 21a)

Similarly, the Court's scope of review on these cases is limited. The Court of Appeals may modify or set aside a decision of the BRB only if it is determined that the Board committed an error of law, or the pertinent findings are unsupported by substantial evidence. 33 U.S.C. § 921(c). *See, e.g., O'Keefe* v. *Smith, etc.*, 380 U.S. 359 (1965); *Peabody Coal Co.* v. *Director*, 581 F. 2d 121 (7th Cir. 1978); *United States Steel Corporation* v. *Gray*, 588 F. 2d 1022 (5th Cir. 1979).

Here, the Board correctly held that the uncontradicted medical evidence of record showed that the presumption of total disability invoked by the ALJ was rebutted as a matter of law. The Board properly held that the ALJ arbitrarily refused to consider uncontradicted expert medical opinion evidence that the man's total disability, if any, was due to his unrelated heart problems and not pneumoconiosis. The Board's ruling is supported by substantial evidence of record in this respect and should have been affirmed.

The Board accepted the ALJ's determination that the one x-ray showing the most minimal category acceptable as pneumoconiosis should be accepted. This finding is not disputed herein by Petitioner. By virtue of this, the ALJ had invoked the presumption of total disability set forth in 20 C.F.R. § 727.203(a)(1).[4] The Board, how-

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[4] The ALJ properly ruled that the only presumption that the claimant could be entitled to was under (a)(1). He specifically weighed the evidence and found that the claimant was not entitled to the invocation of the presumption under § 727.203(a)(2) because the valid pulmonary function tests did not meet the disability levels set in the regulations. Tests which demonstrate less than full effort aren't valid since this is an effort dependent test. Also, none of the arterial blood gas tests met the disability levels to invoke § 727.203(a)(3). No medical report pursuant to § 727.203(a)(4) was introduced.

ever, went on to rule that the ALJ improperly failed to consider all the relevant medical evidence in the case. It was clear error for the ALJ to have done so, and the Board ruled correctly on this point.

20 C.F.R. § 727.203(b) requires that in adjudicating a claim under this subpart, ". . . *all* relevant medical evidence *shall be considered.*" This is basic, of course, and is the law whether the claim is to be decided under the interim presumptions or under the prior regulations. The ALJ, however, rejected expert opinions, *admittedly in the absence of contrary medical opinion*, under the theory that:

> "I believe that it would be unduly speculative to attribute all of his disability to his cardiovascular impairment and none to his pneumoconiosis, and I decline to do so." (Decision pg. 4, § 2). (App. 36a)

There is no evidence in the record to support this finding. It is the ALJ who is speculating, not the doctor. The uncontroverted proof submitted by the Petitioner was that the man could do his usual work but for his cardiovascular problems, which are unrelated to pneumoconiosis. Any total disability he may have, if any at all, did not arise in whole or part from his coal mine employment. There is no evidence, therefore, of record to support the findings of the Judge, nor to support his rejection of this clearly correct rebuttal evidence.

While the adjudication officer is not bound to accept the theory of any one medical expert witness, he is bound to take a qualified medical opinion into account and, absent medical opinion evidence to the contrary, he cannot simply disregard a qualified physician's medical opinion. *Peabody Coal Co.* v. *Director*, 581 F. 2d 121, 124 (7th Cir. 1978). If a physician's report is to be rejected, the adjudicating officer must provide an adequate rationale supporting the decision. *Schaaf* v. *Matthews*, 574 F. 2d 157 (3rd Cir. 1978). The Board properly

found that no valid reason was given by the ALJ for all of the evidence he rejected in this case. The law could not be more clear on this point. As the Third Circuit said in *Gober* v. *Matthews*, 574 F. 2d 772, 777 (3rd Cir. 1978):

> We are left with the impression that the testimony of Dr. Dzurek was rejected because it presented an "exaggeration" only as compared with the administrative law judge's own conclusions.
>
> Such an evaluation would be improper. *While an administrative law judge is free to resolve issues of credibility as to lay testimony or to choose between properly submitted medical opinions, he is not free to set his own expertise against that of a physician who testified before him.* In this respect, we note the following observation by the Supreme Court.
>
> 'The decision whether to continue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson* v. *Perales*, 402 U.S. [389] 404, [91 St. Ct. 1420, at 1428, 23 L. Ed. 2d 842], concerning a subject whom they have personally examined. In *Richardson* the Court . . . emphasiz[ed] that while there may be "professional disagreement with the medical conclusions," the "specter of questionable credibility and veracity is not present."'
>
> After discounting Dr. Dzurek's testimony, the administrative law judge commented that Gober's lung disfunction was "based in part upon emphysema," and "may or may not be due to the fact that he smoked one pack of cigarettes daily for forty years." *It is of questionable propriety in any event for the administrative law judge to speculate on the source of lung disability when no medical evidence was submitted to support such hypothesis.* (emphasis added) (footnotes omitted)

Such words could hardly be more germane than to what the Judge did in this case. He had *no acceptable*

medical evidence before him to cause him to fail to credit the specialists' testimony. See also, *Peabody Coal Co.* v. *Director*, 581 F. 2d 121, 124 (7th Cir. 1978); *Schaaf* v. *Matthews*, 574 F. 2d 157, at 159 (3d Cir. 1978); *Kelly* v. *Railroad Retirement Bd.*, 625 F. 2d 486 (3rd Cir. 1980); *Cotter* v. *Harris*, 642 F. 2d 700, 706 (3rd Cir. 1981); and *King* v. *Califano*, 615 F. 2d 1018 (4th Cir., 1980).

The ALJ, without any medical specialist's opinion evidence in this file to contradict the same, rejected the qualified specialists' opinions on record. He is absolutely not allowed to do this as a matter of law. While there can be no doubt he can choose one conflicting qualified medical opinion over another, he cannot reject properly given medical specialists' opinions in the absence of such contravailing expert opinion evidence.

Under 20 C.F.R. § 727.4(b) the sections of subpart D, Part 410 which are not inconsistent with the new Act, apply to Part 727 claims. They are appropriate to consider, in determining meaning and extent of the Act as to "total disability" due to pneumoconiosis. Under § 410.422 (c), whether or not pneumoconiosis in a particular case renders a miner totally disabled is determined from all of the facts of the case, however, "primary consideration is given to the medical severity of the individual's pneumoconiosis." § 410.426(a).

Section 410.426(a) very clearly provides that:

> "A miner shall be determined to be under a disability *only* if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments *other* than pneumoconiosis may not be considered." (Emphasis added)

As the Courts have clearly held, pneumoconiosis or a chronic respiratory or pulmonary impairment must be shown by a claimant to be the primary cause of his disability. *Gastineau* v. *Mathews*, 577 F. 2d 356, 358 (6th

Cir. 1978); *Ansel* v. *Weinberger*, 529 F. 2d 304, 308-09 (6th Cir. 1976); *Hill* v. *Califano*, 592 F. 2d 341, 346 (6th Cir., 1979); *Back* v. *Califano*, 593 F. 2d 758 (6th Cir. 1979). Claimant has the burden of proving this. *Gastineau* v. *Mathews*, *supra*, at 359; *Prokes* v. *Mathews*, 559 F. 2d 1057, 1060 (6th Cir. 1977). Impairments other than pneumoconiosis cannot be considered.

Since the primary consideration is given to the medical severity of the individual's pneumoconiosis, it is clear from the medical evidence of record, that the Claimant had the most minimal pneumoconiosis acceptable as such by the regulations. The generally accepted medical position is that simple pneumoconiosis is not total disabling *per se*. As this Court so appropriately recognized in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 49 L. Ed. 752, 761 (1976):

> "Simple pneumoconiosis, ordinarily identified by x-ray opacities of a limited extent, is generally regarded by physicians *as seldom productive of significant ventilatory impairment.* Complicated pneumoconiosis generally far more serious, involves progressive massive fibrosis, as a complex reaction to dust . . . and usually produces significant pulmonary impairment . . ." (Emphasis added)

While x-rays can invoke the presumption, medically, of course, they only establish the presence or absence of the disease, not the disability (if any) therefrom. As the Board has succinctly stated:

> "It is well settled that x-rays are not diagnostic of the extent of a respiratory disability, but only of the presence or absence of disease." *Arnoni* v. *Director*, 6 BLR 1-423 at 425 (1983).

The medical evidence of record is clear that the Claimant, if disabled at all, is disabled because of unrelated heart problems, and not due to his minimal pneumoconiosis. All of the medical opinions stated that he was not disabled due to pneumoconiosis. The Claimant has not

proven that he is totally disabled primarily because of pneumoconiosis, excluding the other conditions which may not be considered in determining total disability, and the Board correctly found that the substantial evidence of record showed that the presumption had been rebutted as a matter of law under § 727.203(b)(3).

The Board indicated that it need not reach the question of rebuttal under § 203(b)(2), but the foregoing evidence which is uncontradicted clearly shows that rebuttal, as a matter of law, would apply under this section also.

All of the evidence, therefore, has rebutted the presumption. The Court of Appeals erred in not so finding and affirming. To allow the Court of Appeals decision to stand would be to violate the provisions of the Act, the regulations and the applicable case law. The Court of Appeals decision runs counter to this Court's *Usery* opinion. It sets an improper standard for other cases to be adjudicated under. It is important that the writ issue to set the law straight.

III. THE COURT OF APPEALS ERRONEOUSLY SHIFTED THE BURDEN OF PROOF. THE COURT OF APPEALS IMPROPERLY SHIFTED THE BURDEN OF GOING FORWARD WITH THE EVIDENCE AND THE ULTIMATE BURDEN OF PROOF:

A) The Employer Does Not Have "The Burden of Proving That Mr. Gibas Was Not Totally Disabled;" and

B) The Employer Successfully Rebutted the Presumption of Total Disability in 20 C.F.R. § 727.203(a)(1).

THESE ISSUES ARE OF GREAT IMPORTANCE IN THE ADJUDICATION OF BLACK LUNG CLAIMS AND WILL AFFECT THE RESOLUTION OF MANY, IF NOT ALL, CLAIMS.

As this Court has stated, the effect of a presumption in these and other cases is simply "to shift the burden of going forward with evidence from the claimant to the operator. See Fed. Rule Evid. 301." *Usery* v. *Turner-*

Elkhorn Mining Company, 428 U.S. 1, 27, 49 L. Ed. 752, 773 (1976). In *Usery* this Court indicated that Rule 301 of the Federal Rules of Evidence, applies to Federal Black Lung claims, and its language is as follows:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

It is clear, therefore, that the presumption does not constitute evidence and does not shift the burden of persuasion from the claimant to the operator. The presumption merely shifts the burden of going forward. Once probative evidence is introduced on the issue of total disability or the cause of total disability, the presumption no longer carries the claimant's case. The burden of going forward having been shifted to the operator, and by the overwhelming evidence introduced, it has sustained its burden of going forward on these issues. The claimant then must carry his ultimate burden of proof, that is, the burden of persuasion which does not shift. *Prokes* v. *Matthews*, 559 F. 2d 1057, 1060 (6th Cir. 1977). He has clearly failed in his burden in this case.

The Court of Appeals, it is respectfully submitted, failed to apply the appropriate standard for rebuttal of the presumption. The Court of Appeals erroneously held that once the presumption of total disability was invoked by Claimant's evidence, "Saginaw had the burden of proving that Gibas was not totally disabled." It is respectfully submitted that this flies in the face of established Evidence Rules and the decisions of this Court. As this Court quite clearly held in *Usery* v. *Turner-Elkhorn Mining Company*, the effect of a presumption is simply to shift the burden of going forward with the evidence from

the claimant to the operator, and the ultimate burden of proof remains on the party whom it was originally cast—in this case the claimant. In *Usery* this Court specifically referred to Rule 301 of the Federal Rules of Evidence as being applicable. See *Usery* v. *Turner-Elkhorn Mining Company*, 428 U.S. 1, 27, 49 L. Ed. 752, 773 (1976).

The Court of Appeals decision simply does not recognize the sequence of evidentiary consideration that must be engaged in by the Administrative Law Judge. If claimant successfully invokes the total disability presumption in § 727.203(a) by his evidence, the question then becomes whether the operator's evidence is sufficient to rebut the presumption. The ultimate burden of proof never changes. Should the operator's evidence be sufficient to rebut the presumption, which is submitted that it was in uncontradicted fashion in this case, then the burden remained upon the claimant to prove he was totally disabled due to pneumoconiosis. The Court of Appeals decision shifted the burden of ultimate proof, which is certainly contrary to all rules of law, the regulations, the evidentiary rules, and this Court's clear expression in the *Usery* case as set forth hereinabove.

This sequence of evidentiary consideration, of course, is extremely important in the processing of these cases. This case was decided under the Interim presumptions in Part 727 of 20 C.F.R., which are liberal in a claimant's behalf as to invoking of the presumption of total disability. It would be absolutely contrary to the statute and regulations to hold that the ultimate burden of proof also shifted to the operator when this is not what the statutes nor the regulations provided and especially under the interim presumption cases where the threshold of presumptive invocation is so low. These types of issues obviously arise in many, if not most, "Black Lung" cases. Thousands upon thousands of these cases have yet to be decided. Attached in the Appendix, at 52a-58a, is a copy of the Black Lung Reporter index of Board decisions dealing

with § 727.203(a) presumption invocation and § 727.203 (b) rebuttal. It can be seen there are many reported cases thereon.

It is submitted that the Court of Appeals in ruling on the important questions herein departed from the accepted and usual course of judicial proceedings, and in conflict with this Court's decision in *Usery*, so as to call for an exercise of this Court's power of supervision. This Court has not examined such issues since *Usery*. It is submitted that the issues herein are important questions of federal law which should be settled by this Court. This Court, it is respectfully urged, should hear and rule upon these important points.

CONCLUSION

For the foregoing special and important reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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